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SUPREME COURT, U. S.

In the Supreme Court of the United States

MICHAEL RODGER CHAMBERS,

Petitioner,

vs.

THE STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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FRANKLIN PRESS YAKIMA, WASH.

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above entitled case on May 21, 1973.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of the State of Washington, printed in Appendix B hereto, infra p. 20, is reported in ___ Wn.2d ___, ___ P.2d ___, 1973. See also order denying petition for rehearing and remittitur, infra (Appendix B, p. 20).

JURISDICTION

The judgment of the Supreme Court of the State of Washington, the court of last resort in Washington State, was entered on May 21, 1973 infra (Appendix B, p. 20). This matter is criminal in nature. The jurisdiction of this court is invoked under 28 USC S1257(3).

QUESTIONS PRESENTED

1. Whether the State of Washington, through its hunting license regulations, may restrain the treaty secured hunting rights of an enrolled Yakima Indian within that State.

2. Whether a state court's refusal to allow competent evidence of an Indian treaty right, together with instructions presenting a theory of defense based on said evidence, violates the fundamental fairness doctrine and thereby results in a lack of due process of law?

STATUTES INVOLVED

The statutory provisions involved are: R.C.W. 77,32.010, 28 USC S1257(3), and Article 3 of the *Treaty with the Yakimas of 1855* (12 Stat. 951 1859). They are printed in Appendix A, infra pp. 18-19.

STATEMENT OF THE CASE

Appellant, an enrolled member of the Yakima Indian Nation, was arrested on the following charge:

> "Hunting big game animals, to wit: deer without first obtaining and having in his possession a valid Washington hunting license."

This charge was based upon R.C.W. 77.32.010 (Infra, Appendix A, p. 18-19) which provides:

> "It shall be unlawful for any person to hunt, trap, or fish for game animals, fur-bearing animals, game birds or game fish during the season when it is lawful to hunt, trap, or fish for them or to practice taxidermy for profit, or to receive or purchase or resell raw furs for profit, without first having procured and having in force, and in his personal possession, and on his person while so hunting, trapping, fishing, or practicing taxidermy, or dealing in furs, a license so to do issued to him as provided in this chapter: ***"

The facts surrounding the Appellant's arrest and trial are quite simple. The incident in question occurred on October 11, 1959 during a regularly scheduled open deer season in Asotin County, Washington. The exact location of the arrest was approximately 12 miles south of the town of Asotin, in the Couse Creek Drainage Area. This was outside the area ceded by the Yakimas in the *Treaty of 1855*.

At approximately 6:00 p.m. on October 11, 1969 Donald Steele, a game protection officer for the Washington Department of Game, had occasion to make contact with the Appellant during a routine game check at the Couse Creek Road. At this time Officer Steele asked Appellant and his companion if they had any luck, to which Appellant replied affirmatively. Officer Steele then proceeded to check a deer which was in the rear of

Appellant's vehicle. Upon noticing that the animal, being a spike buck and therefore legal during this season, did not have a deer tag on it, the officer requested that Appellant produce his license and tag. At this point Appellant exhibited a card verifying his status as a registered member of the Yakima Indian Nation, and asserted that he needed no tag or license as he was hunting under his tribal treaty rights. The officer informed Appellant that it was his opinion that a license was required, and requested that Appellant accompany him to Clarkston in order to consult with his superior.

The officer was unable to reach his superior until Monday, October 15, and at that time he was advised to and did issue a citation for hunting without a license. Throughout the entire period Appellant asserted his treaty rights to hunt without a license.

A trial was had in the Justice Court of Asotin County and Appellant was found guilty. His defense throughout this proceeding was based upon his treaty rights.

Article III of the *Treaty With the Yakimas* (12 Stat. 951) provides as follows:

> "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the territory, and of erecting temporary sheds and buildings for curing them; *together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.*" (emphasis added)

In connection with Article III Appellant attempted to indicate how the Indian signatories interpreted the terms thereof by use of the minutes taken at the Treaty grounds.

Upon trial de novo to the Washington Superior Court the parties stipulated to the following facts:

> "1. Prior to 1942 the Washington Department of Game required hunting licenses for Indians and non-Indians alike. When an Indian hunted within Indian reservation boundaries, no hunting license was required because the State, then as now, does not assert any jurisdiction or authority on reservation Indian hunting activities.
>
> "2. Subsequent to the decision of the United States Supreme Court in *Tulee v. Washington*, 314 U. S. 681 (1942), the Washington Department of Game instituted a policy of not requiring hunting licenses for treaty Indians to hunt within the boundaries of the State of Washington when and where it was otherwise lawful to do so. Said policy was not promulgated as a Game Department regulation and, therefore, was adopted without public notice and public hearing; but said policy was followed by the Department of Game until 1958.
>
> "3. In 1958 the Department of Game changed its policy regarding the licensing of off-reservation treaty Indian hunting activities. The Department of Game then caused to be published in its hunting and fishing pamphlets substantially the following language:
>
> " 'Any person of Indian ancestry who is eligible by virtue of the Stevens Treaty may hunt or fish without a license within the area originally ceded by his Tribe as set forth in said Treaty. Such persons are not required to possess deer elk, bear, and goat tags while hunting or fishing within such areas.
>
> " 'Treaty Indians, hunting without a license, may submit applications for controlled hunts (special drawings) only if the areas selected are within the

boundaries of lands originally ceded by their Tribe.'
"Said policy was adopted by the Washington Department of Game without public notice and public hearing and was not promulgated as a regulation. Said policy was adopted as a result of a legal interpretation by the Department of Game of Indian Treaties covering Tribes of the State of Washington.

"4. That the defendant, Michael Rodger Chambers, is and at all times herein mentioned, was an enrolled member of the Yakima Indian Nation, covered by the Treaty with the Yakimas (12 Stat. 951)."

It was further stipulated that the minutes of the Treaty Council of 1855 and the treaty itself would be admitted into evidence. The court did not, however, allow the treaty minutes to go to the jury room as evidence on the grounds that they were not a part of the treaty.

During the Superior Court trial the State produced evidence to show that the area where Appellant had killed his deer was in private ownership and that there were fences around the property, although there was some dispute as to the actual ownership of the spot where the deer fell. On nearby land were "free to hunt" signs, allowing free access to private property for hunting purposes.

Although it was established that there were fences in the area, there were no gates to be opened to gain access, no signs posted, and no signs of human occupancy other than a house about 1/3 to 1/2 mile away which was unoccupied. The area had the appearance of open range land, being covered with sagebrush and rock outcroppings.

Appellant, in conjunction with his assertion that he had been hunting within his treaty rights, attempted to introduce oral historical evidence of what the Yakima treaty signatories had interpreted the words "open and unclaimed" to mean. The court rejected this evidence on the ground that it was not relevant in relation to the assertion of Appellant's treaty rights. Appellant made a comprehensive offer of proof in this regard.

RAISING OF QUESTIONS FOR REVIEW

The great bulk of issues raised were presented in the Superior Court as requests to charge the jury and the exceptions thereto. The remaining issues involve evidentiary questions on the interpretation of Indian treaties, and the constitutionality of a state statute. All these issues were preserved by assignments of error in the Washington State Supreme Court.

As the portions of the record relied upon are rather voluminous, they have been printed in Appendix C. Following is a brief synopsis of the claimed errors and where they appear in the record of the court indicated.

The first issue is the refusal of the trial court to allow minutes of the Treaty meetings to be taken into the jury room. Said minutes were admitted as defendants Exhibits "4" and "5" (Stmt. of Facts, page 35), and the trial court refused to allow them to go to the jury (Stmt. of Facts, page 76-77). Exception was taken to this ruling (Stmt. of Facts, page 77) and was pre-

served by assignment of error in the State Supreme Court (App. Opening Brief, page 7).

The second issue is the trial court's refusal to allow oral testimony as to the historical circumstances surrounding the signing of the treaty as they affected the intention of the parties. Petitioner moved to present such testimony through a qualified witness. Respondent's objection was sustained by the trial court (Stmt. of Fact, page 52). Petitioner made an extensive offer of proof and exception to the trial court's ruling (Stmt. of Facts, pages 52-61). The issue was preserved by assignment of error in the State Supreme Court (App. Opening Brief, page 7).

The remaining issues involve requests to charge and exceptions to the refusals of the trial court to do so. Petitioner excepted to the giving of court's instruction 4A. Exception is noted at page 68 of the Statement of Facts. Issue was preserved by assignment of error in the State Supreme Court (App. Opening Brief, page 7). The remaining issues or instructions were preserved by exceptions to refusals to charge in regard to petitioner's proposed instructions 5, 6, 7, 8, 9, 10, 11, 12 and 14. Exceptions are noted at pages 69 to 74 of the statement of facts. Issue was preserved by assignment of error in the State Supreme Court (App. Opening Brief, pages 8 to 11). The last issue concerns petitioner's challenge to the constitutionality of the Washington State hunting license statute, R.C.W. 77.32.010

(Appendix A, p. 18). This issue was raised in the trial court in Petitioner's motions to dismiss (Stmt. of Facts, pages 35 and 63), which were denied by the court (Stmt. of Facts, pages 36 and 64). Issue was preserved on appeal by assignment of error (App. Brief, p. 7).

REASONS FOR GRANTING THE WRIT

The Supreme Court of the State of Washington decided a federal question of substance not before heard by this court. That in so doing the state court decided said question upon reasoning most likely not in accord with applicable decisions of this court.

As noted in the statement of the case the question involves the right of an enrolled Yakima Indian to hunt without a license in the State of Washington. The thrust of the state court's opinion, and Petitioner submits the main basis upon which this writ should be granted, is found in the last paragraph of the opinion:

> "A review of article 3 reveals that it reasonably reflects the tenor of the minutes. Further, the trial court did not commit error by interpreting the tribal rights of Indians to hunt under the terms of article 3. On the contrary, instruction 4A quite reasonably provided for the modern Indian's protection. It required not only that the land be in private ownership but that there be 'outward indications of such ownership observable to a reasonable man' thus, preventing entrapment of an unwary Indian hunter. This accorded to appellant all hunting rights he possessed under the treaty."

It is obvious from reading the State Supreme Court's opinion and the instructions refused and exceptions thereto in the trial court (infra Appendix C), that both courts failed to apply proper interpretive aids in reaching their decisions.

The trial court's instruction 4"A" (infra App. A, p. 18), which was excepted to by petitioner clearly illustrates the atitude of the court. Instruction 4"A" defines the treaty language "open and unclaimed lands" as found in Article 3 of the *Treaty with the Yakimas of 1855* (infra, App. B, p. 18), solely as lands not in private ownership. There is absolutely no basis, either in the treaty, the minutes of the treaty, Yakima Indian history, or case law which support such a narrow interpretation of this valuable treaty right.

In all the cases decided to date on Indian hunting rights under treaties containing the same or similar language, the courts have not had to face the issue of private ownership, as the arrests in question occurred on federal lands. *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953); cert denied 347 U.S. 437 (1954); *Confederated Tribes of Umatilla Reservation v. Maison*, 263 F.Supp. 871 (1966); aff'd 382 F.2d 1013 (1967) (9th Cir. Court of Appeals). It is submitted therefore that no case law supports the trial court's instruction.

The treaty language itself certainly contains nothing which could lead to such a conclusion. Restrictions

upon treaty fishing rights must come from the treaty itself:

> "We hold that the plaintiffs' treaty reserves to them those unimpeded fishing rights which their ancestors had long enjoyed before the treaty, subject only to the qualifications contained within that document." *Maison v. Confederated Tribes of The Umatilla Reservation*, 314 F.2d 169 (9th Cir.), *cert. denied* 375 U. S. 829, 11 L.Ed.2d 60 (1963). (emphasis added)

This concept has recently been applied to treaty secured hunting rights as well. *Holcomb v. Confederated Tribes of the Umatilla Reservation*, 382 F.2d 1013 (1967).

Webster's Seventh New Collegiate Dictionary has one of its definitions of the word "open"; "*characterized by ready accessibility and cooperative attitude*". A second definition from that same volume is "*so arranged as to permit ingress, egress, or passage; as having no enclosing or confining barrier; not shut or fast*". "Unclaimed" is defined as "*free from claim, as land not staked out by anyone*". These are the technical phrases which a person educated in the white man's culture would most likely attach to such words. As noted previously, however, Indian treaties are not so interpreted:

> "We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules'. *(Choctaw Nation v. U.S.)* 119 U.S. 1 (7 Sup. Ct.

75, 30 L. Ed. 306; *Jones v. Meehan*, 175 U.S. 1 (20 Sup. Ct. 1, 44 L.Ed. 491)."

United States v. Winans, 198 U.S. 371 (1905). In making such an interpretation it is therefore necessary to consider the conditions existing at the drawing of the treaty.

It is in this regard that the state courts erred. Both trial and state supreme court adamantly refused to recognize that Yakima treaty rights flow from the understanding and intent of the signing chiefs at the treaty grounds in Walla Walla in 1855. As this court is well aware this has often been the position of Washington State in dealing with its treaty Indians, i.e. *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed 1115 (1942); *Puyallup v. Washington State Department of Game*, 88 S.Ct. 1725, 391 U.S. 392, 20 L.Ed2d 689 (1967). There is no law, either by decision or statute, which allows a state court to decide a treaty issue on the basis of what a "modern Indian's" rights should be. Such a determination is clearly in conflict with each and every opinion of this court dealing with Indian treaty interpretation.

Petitioner therefore submits that the failure of the trial court and the Supreme Court of the State of Washington to properly interpret petitioner's treaty rights is sufficient to warrant review by this court.

Further, neither the trial court nor the State Supreme Court properly resolved the burden of the state's proof in this matter. This court has consistently held that Article 3 of the Yakima Treaty requires the

state to prove that its fishing regulation rest on sound conservation principles before Indian fishermen may in any manner be regulated. *Tulee, supra, Puyallup, supra.* While there is no definitive opinion from this court on Indian hunting rights, the Ninth Circuit Court of Appeals has applied the "reasonable and necessary" for conservation test to Indian hunting rights. *Holcomb v. Confederated Tribes of the Umatilla Reservation,* 382 F.2d 1013 (1967). The decision of the State Supreme Court in this matter is clearly in conflict with that decision.

The licensing requirement of the State of Washington is void as to enrolled Yakima Indians. This factor was not adequately covered by the State Supreme Court in its opinion.

Petitioner submits that Yakima Indians, while exercising treaty secured hunting and fishing, are not subject to licensing restrictions of the state. This exemption has clearly been established by the federal court in *Tulee v. Washington, supra* and *Holcomb v. Confederated Tribes of the Umatilla Reservation, supra.* These cases, of course, are only affirmations of Article VI, Clause 2 of the United States Constitution that:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

As the supreme law of the land, the Yakima Treaty of 1855 and the rights contained therein are subject only to the qualifications confined within the document. *Maison v. Confederated Tribes of Umatilla Reservation, supra.* While the federal government may have power to extinguish said rights, the same power is not enjoyed by the states. *State v. Arthur, supra; Makah Indian Tribe v. Schoettler,* 192 F.2d 224 (1951); *U.S. v. Winans,* 198 U.S. 371, 25 S.Ct. 683, 491 L.Ed. 1089 (1904).

The right of treaty Indians to hunt and fish without state restriction is a paramount concern in treaty interpretation. It is clear that such rights, at least so far as being free of license restrictions, are reserved to the tribes. *Tulee v. Washington, supra; State v. Arthur, supra.* This right is a property right vested in the tribes, *State v. Arthur, supra,* and as such cannot be disposed of by action of the state. *U.S. v. Ahtanum Irrigation District,* 236 F.2d 321, Cert. denied 352 U.S. 988 (1957).

The Supreme Court of Idaho, in *State v. Arthur, supra at* 143, made the following statement which is apropos to the present situation:

> "*Out of the solemn obligations of the treaty, and the express reserved property right which never passed from the Indians to anyone and which the federal government has never extinguished* but has expressly recognized before and after Idaho was admitted to the Union, the Nez Perce would now have no right in any respect different than that enjoyed by all others, except perhaps the freedom from the burden of a license fee. This was never intended under

> the broad, fair and liberal construction of the treaty. The Supreme Court of the United States has recognized and expressly held that the Indian treaty fishing provisions accorded to them rights which do not exist for other citizens. *Tulee v. Washington, supra; Seufert Bros. Co. v. United States, supra; United States v. Winans, supra.* What are such rights under the State's theory? Perhaps to hunt without a license. If such rights exist as to fishing most assuredly they exist as to hunting. If the State can regulate the time of year in which they may hunt then they are accorded no greater rights in this respect than exist for other citizens."

Petitioner submits that the state licensing policy is in conflict with the free exercise of his treaty rights and must therefore yield.

Further and apart from the pure treaty interpretation issue, Petitioner submits that the State Supreme Court improperly denied Petitioner's contention that the actions of the trial court in refusing pertinent instructions on treaty rights denied petitioner due process of law.

The trial court, in refusing to allow historical testimony on the meaning of the Yakima Treaty, (see offer of proof of testimony of Louis Cloud, infra App. C. p. 00) and in refusing to charge the jury on petitioner's proposed instructions 7 through 12 (infra, App. C. p. 00), denied petitioner the right to present and charge upon his theory of the case.

Under Washington law historical testimony is admissible for purposes of treaty interpretation. *State v. James*, 72 Wn.2d 746, 435 P.2d 521 (1967). Further,

the instruction proposed and rejected (infra, App. C, p. 00), were proper statements of the law based upon the evidence and therefore should have been given under the law of the State of Washington. *Nicholson v. Gibler*, 1 Wn.App. 368, 461 P.2d 900 (1969); *Meabon v. State*, 1 Wn.App. 824, 463 P.2d 789 (1970).

Throughout the trial Petitioner attempted to establish the nature of the treaty right to which he was entitled and time and again his evidence was denied. The trial court compounded that error by refusing to allow petitioner to instruct the jury on his theory of defense. This action by the court not only denied petitioner the right of presenting his theory of the case, it denied him his right to due process of law. To completely deny presentation of one's theory of defense by refusing the use of fully competent evidence and jury instructions of unimpeachable correctness smacks of a violation of the fundamental fairness doctrine. *Foster v. Illinois*, 332 U.S. 132 (1947); *Carter v. Illinois*, 329 U.S. 173 (1946).

That the court prevented Petitioner from presenting his theory of defense is readily apparent by looking to the instructions given. Although this case involved a major issue of a federally protected treaty right, the trial court saw fit to give only two instructions out of twelve which even mention such a treaty. Such action is wholly inconsistent with requirements of law and justice. The jury was not even apprised of the fact

that an Indian treaty was the status of the supreme law of the land and therefore may override state laws in conflict with it. *State v. James, supra.* Such gross oversight on the part of the trial court clearly constitutes prejudicial and reversible error.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES B. HOVIS
Counsel for Petitioner

DATED: August 10, 1973

APPENDIX "A"

ARTICLE III

TREATY WITH THE YAKIMAS, 12 Stat. 951

And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

28 USC S1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States,
* * *

R.C.W. 77.32.010

General rules as to issuance. It shall be unlawful for any person to hunt, trap, or fish for game animals, furbearing animals, game birds or game fish during the

season when it is lawful to hunt, trap, or fish for them or to practice taxidermy for profit, or to receive or purchase or resell raw furs for profit, without first having procured and having in force, and in his personal possession, and on his person while so hunting, trapping, fishing, or practicing taxidermy, or dealing in furs, a license so to do issued to him as provided in this chapter: *Provided*, That nothing in this section shall prevent a person under the age of sixteen years, from fishing at any time when it is otherwise lawful to fish: *Provided further*, That any person over the age of seventy years who has been a resident of Washington for ten years or more shall be issued, upon making an affidavit to such effect, a license to fish at any time when it is otherwise lawful to fish. The state game commission in its discretion may authorize license dealers to issue such licenses and make a charge therefor which shall not exceed twenty-five cents: *Provided, further*, That a license shall not be required of a person who hunts predatory animals or birds without claiming or intending to claim a bounty.

All licenses under this chapter shall be issued by or under the authority of the director, who may deputize game protectors, any county auditor, or any reputable citizen, to issue such licenses and collect the fees therefor.

All persons so deputized by the director shall, on demand, on or before the thirty-first day of December of each year, pay to the director all fees collected and make and furnish all reports required by the director. The commission may make all necessary rules and regulations regarding the issuance of licenses, the collection and payment of fees collected, and the making and furnishing of reports in connection therewith.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent*,	)	No. 42450 En Banc
v.	)	
MICHAEL RODGER CHAMBERS, *Appellant*.	)	Filed Feb. 15,1973

STAFFORD, J. — Michael Chambers was convicted of hunting deer without a valid Washington State hunting license in his possession. He appeals.

There is substantial evidence that on october 11, 1969, during the open deer season, appellant killed a spiked buck mule deer in the Couse Creek area of Asotin County. Appellant's counsel admitted ,in oral argument, that the area in which the kill took place was at least 40 miles from the nearest territory ceded to the United States government by the Yakimas in the Treaty of 1855.

The land on which the deer was killed and from which it was removed was privately owned by a Mrs. Weissenfels. An unoccupied house was located thereon, approximately a third to a half mile from the scene. The property was range land entirely enclosed by a barbed wire fence. It was necessary for one to climb over the fence or to go through the gate to gain entry. Although appellant does not recall climbing the fence, he admits that there could have been one.

The fence enclosing the Weissenfels property was neither posted with Game Department signs authorizing permissive hunting nor with "no trespassing" or "no hunting" signs. There is some evidence that adjacent land owned by a Mr. Floch may have been posted with signs furnished by the Game Department under

its sportsman-farmer program. If the Floch land was posted, such signs would have indicated that the owner of the posted land had opened it to hunters by permission. There is no government land in the immediate vicinity.

At the time the deer was killed, appellant did not possess a valid Washington State hunting license as required by RCW 77.32.010. He was, however, an enrolled member of the Confederated Tribes and Bands of the Yakima Indian Reservation. When he was arrested appellant presented the game protector with proof of his enrolled status. It was appellant's position then, as well as now, that he was entitled to hunt without a license, pursuant to the provisions of the Treaty of 1855 (12 Stat. 951 (1859)). Article 3 of the treaty reads in part:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; *together with the privilege of hunting*, gathering roots and berries, and pasturing their horses and cattle *upon open and unclaimed land.*

(Italics ours.)

The central question is whether article 3 of the treaty entitled appellant to kill the deer, as he did, without a state hunting license, on fenced private property, and off the reservation.

During the trial the court admitted minutes of the proceedings that gave rise to the treaty. The trial judge used them as an aid for understanding article 3 which in turn gave rise to instruction 4A. The court refused, however, to submit the treaty minutes to the

jury for the purpose of enabling them to make their own interpretation of article 3.

Appellant concedes that the proper legal interpretation of article 3 is technically a matter of law. Nevertheless, he assigns error to the trial court's refusal to submit the minutes and contends "the ends of justice would have been better served to allow them [the jury] to observe the documents upon which their deliberation must . . . be based."

The trial court did not err. The proper construction and interpretation of article 3 was a matter of law to be resolved by the trial court and not by the jury. RCW 10.46.070; RCW 4.44.080; *State v. Comer*, 176 Wash. 257, 266, 28 P.2d 1027 (1934); *State v. Richards*, 97 Wash. 587, 167 P. 47 (1917). It is the duty of the jury to accept the court's statement of the law, regardless of what the jurors personally may believe the law is or ought to be. On the other hand, it is the province of the jury to apply the facts to the court's declaration of the law. RCW 10.46.070, RCW 4.44.090. It would have been error for the trial court to submit the minutes to the jury and, thus assign to it the additional duty of resolving the questions of law inherent in the factual situation.

Appellant also assigns error to the trial court's refusal to permit Mr. Louis Cloud to testify concerning an asserted interpretation of the treaty by the Indian signatories in 1855. Mr. Cloud is a member of the Yakima tribal council and chairman of several tribal committees.

Appellant's offer of proof reveals that Mr. Cloud's testimony was presented solely for presentation to the *jury*. It was submitted to aid the jurors in their interpretation of that part of article 3 which refers to an Indian's right to hunt "upon open and unclaimed land". This, of course, is the very subject upon which the trial

court was required to instruct the qury. Had the jury been permitted to hear the proffered testimony, the legal meaning of the questioned phrase could have dissolved into a state of utter confusion. Conceivably the jury could have construed article 3 in a manner quite differently from that given it in the court's instruction. For this reason it would have been error for the trial court to abdicate its responsibility by assigning to the jury the duty of resolving the central question of law.

Appellant did not offer the testimony to be heard in the absence of the jury as an aid to the *court* in formulating an instruction concerning the meaning of the questioned phrase. While such consideration might have provided a logical interpretive aid, no such offer of proof was made. Thus, we may not speculate upon whether the testimony should have been received for that limited purpose. *State v. Pierce*, 175 Wash. 523, 27 P.2d 1087 (1933); *State v. Myers*, 47 Wn.2d 840, 290 P.2d 253 (1955); *State v. Rakes*, 2 Wn. App. 833, 472 P.2d 399 (1970).

Appellant asserts the trial court erred in its failure to give his proposed instructions 7, 8, 9, 10, 11 and 12. We do not agree. The trial court correctly refused to give them. Each was a proposed rule to aid the jury in interpreting or construing Indian treaties. Assuming, without deciding, that they correctly state abstract rules for the construction or interpretation of such treaties, they should be used only by the trial court in formulating the law upon which to instruct the jury. RCW 10.46.070; RCW 4.44.080; *State v. Comer, supra; State v. Richards, supra.* As indicated earlier, it would have been error to submit such rules of construction or interpretation to the jury. This would have left to the jury the duty of interpreting the treaty and, thus, declaring the ultimate law based upon the jury's own interpretation thereof.

Appellant's exception to the court's failure to give his proposed instruction 14 is not well taken. It is grounded upon the mere statement that it is a correct statement of the law. Such an exception is not sufficient. *State v. Lyskoski*, 47 Wn.2d 102, 287 P.2d 114 (1955).

Appellant assigns error to the court's refusal to give his proposed instruction 15 which reads:

> In determining what "Occupied" means you are instructed that the definition in Webster's Dictionary is as follows: *To engage the attention or energies of;* to fill up (an extent in space or time); to take or hold possession of; to reside in as an owner or tenant.

(Italics ours.) Assuming the abstract definition is correct, clearly the italicized portion is not proper. It fails to apply to the subject of occupying, holding or possessing land. The trial court is not called upon to revise a proposed instruction to make it properly applicable. *Ste. Marie v. Command*, 60 Wn.2d 189, 373 P.2d 121 (1962); *see also Mannisto v. Boeing Airplane Co.*, 60 Wn.2d 304, 373 P.2d 496 (1962).

The trial court properly rejected the instruction for another reason. There was no apparent logic for giving the instruction and no valid reason for giving the instruction was diclosed. The sole explanation for taking exception to the court's refusal to give the proposed instruction was that it is "a definition of 'Occupied' which should be before the jury." The word "occupied" defined in the proposed instruction does not appear in any instruction given by the trial court or in any proposed instruction of appellant to which an exception was taken. Further, it does not appear in article 3 of the treaty. Thus, the exception was insufficient under CR 51(f); *State v. Scott*, 77 Wn.2d 246, 461 P.2d 338 (1969).

Error is assigned to the giving of instruction 4A which reads:

> You are instructed that the Treaty with the Yakima of 1855 was made between the United States Government and various Indian tribes. The treaty provided that members of said tribes possessed the privilge of *hunting on open and unclaimed lands.* Open and unclaimed lands, within the meaning of the Treaty with the yakima, is defined to mean *lands which are not in private ownership.* If you find beyond a reasonable doubt that the defendant was engaged in a hunting activity *on lands in private ownership with outward indications of such ownership observable to a reasonable man,* as distinguished from governmental ownership, then you shall find the defendant guilty as charged.

(Italics ours.)

Appellant's principal objection is that the instruction defines "open and unclaimed lands", as used in article 3 of the treaty, in terms of "lands which are not in private ownership". He argues that this misinforms the jury as to the extent of appellant's treaty rights and is a limitation found neither in the treaty nor in the minutes of the treaty.

Appellant concedes that:

> Webster's Seventh New Collegiate Dictionary has as one of its definitions of the word "open"; "*characterized by ready accessibility and cooperative attitude*". A second definition from that same volume is "*so arranged as to permit ingress, egress, or passage; as having no enclosing or confining barrier; not shut or fast*". "Unclaimed" is defined as "*free from claim, as land not staked out by anyone*".

Without question the foregoing is the commonly accepted English usage of the words in question. Appellant argues, however, that while one educated in the

white man's culture would accept such usage, the treaty must be construed as the unlettered Indian would have understood it, without technical rules of construction. Thus, appellant contends, we must consider the conditions as they existed at the time of the treaty.

The pertinent portion of article 3 and the minutes thereof disclose that two independent rights were involved. One was the tribal right of the Indian to wander, gather roots and berries, pasture his livestock and to hunt. The other was the right of the white settler to privacy in the use of the land he had acquired and staked out. The presence of both settlers and Indians in the same territory and the possiblity of conflict, if demarcation of landownership remained undetermined, was recognized. For example, the treaty minutes provided, at folio 111:

> [A]lthough we may live near together there should be a line of distinction drawn so that the Indian may know where his land is and the white man where his land is; you are all able to judge for yourselves by the constant difficulties that are occurring here among you, between the whites and the Indians.

The treaty was but a common sense resolution of the foregoing problem, as it then existed between the settlers and the Indians, and as it would most logically have been understood. In other words, there was one territory that was expected to have a dual use by both white settlers and Indians. Neither article 3 nor the minutes of the treaty are inconsistent with a recognition of such a dual use and a need for mutual protection of those rights.

The treaty obviously extinguished some tribal rights in the land then under consideration. The problem is the extent thereof.

While article 3 reserved to the Indians the right of "taking fish *at all usual and accustomed places*, in common with the citizens of the territory . . ." (italics ours) the other rights of gathering roots and berries, pasturing livestock and hunting were confined to "*open and unclaimed land.*" (Italics ours.) This then left them free to wander at will, to pick roots and berries, pasture their livestock and hunt as they had from the beginning of time. They were restricted only in those areas staked out by the white man as his own place to settle. This is both logical and consistent with article 3 and the treaty minutes. For example, the minutes provide in part, at folio 123:

> They shall have the same liberties outside the Reservation *to pasture animals on land not occupied by whites, to kill game*, to get berries and to go on the roads to market.

(Italics ours.)

Further, at folio 139, the treaty minutes provide in part:

> Gov. Stevens. I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that *in this reservation settlers cannot go*, that *he can graze his cattle* outside of the reservation *on lands not claimed by settlers*, that he can catch fish at any of the fishing stations, *that he can kill game* and go to Buffalo when he pleases, that *he can get roots and berries on any of the lands not occupied by settlers.*

(Italics ours.)

A review of article 3 reveals that it reasonably reflects the tenor of the minutes. Further, the trial court did not commit error by interpreting the tribal rights of Indians to hunt under the terms of article 3. On the contrary, instruction 4A quite reasonably provided for

the modern Indian's protection. It required not only that the land be in private ownership but that there be "outward indications of such ownership observable to a reasonable man" thus, preventing entrapment of an unwary Indian hunter. This accorded to appellant all hunting rights he possessed under the treaty.

The trial court is affirmed.

Stafford, J.

We Concur:
Finley, J.
Hunt, J.
Hamilton, J.
Rosellini, J.
Wright, J.
Utter, J.

I concur in the results.
Hale, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,	)	REMITTITUR
Respondent,	)	No. 42450
v.	)	Asotin County No.
MICHAEL RODGER CHAMBERS,	)	11107
Appellant.	)	C/A 482-III

The State of Washington to: The Superior Court of the State of Washington in and for Asotin County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on February 15, 1973, became the final judgment of this court in the above entitled case on May 21, 1973. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: No cost bill having been filed, costs are deemed waived.

The petition for rehearing was denied by order dated May 21, 1973.

cc: Mr. James B. Hovis
Honorable Ray Roy Jones
Asotin Co. Prosecuting Attorney
Honorable Slade Gorton
Attorney General
Mr. J. L. Coniff
Clerk, Division III
Reporter of Decisions

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 21st day of May, A.D. 1973.

WILLIAM J. LOWRY
Clerk of the Supreme Court, State of Washington.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,* v. MICHAEL RODGER CHAMBERS, *Appellant.*	No. 42450 Department ORDER DENYING PETITION FOR REHEARING

The Court having considered the appellant's petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 21st day of May, 1973.

By the Court:

Frank Hale
Chief Justice

81 Wn.2d 929

APPENDIX "C"

ASSIGNMENTS OF ERROR

The trial court erred:

1. In refusing to allow the minutes of the Treaty of 1855 to be taken into the jury room.

2. In refusing to allow Mr. Louis Cloud to testify as to the interpretation placed upon the treaty by the Indian signatories at Walla Walla in 1855.

3. In giving instruction 4"A":

"You are instructed that the Treaty with the Yakima of 1855 was made between the United States Government and various Indian tribes. The treaty provided that member of said tribes possessed the privilege of hunting on open and unclaimed lands.

Open and unclaimed lands, within the meaning of the Treaty with the Yakima, is defined to mean lands which are not in private ownership. If you find beyond a reasonable doubt that the defendant was engaged in a hunting activity on lands in private ownership with outward indications of such ownership observable to a reasonable man, as distinguished from governmental ownership, then you shall find the defendant guilty as charged."

4. In refusing to give defendant's proposed instruction no. 7:

"A treaty with an Indian tribe has the same force and effect as a treaty with a foreign nation. It consequently is the supreme law of the land binding upon State courts, legislators and regulatory and enforcement agencies. The Yakima Treaty reserves to the defendant those unimpeded hunting rights which his ancestors had long enjoyed before the Treaty, subject only to the qualifications contained within that document."

5. In refusing to give defendant's proposed instruction no. 8:

"Words used in a treaty must be construed in the sense in which they would naturally be understood by the Indians."

6. In refusing to give defendant's proposed instruction no. 9:

"The language used in Treaty with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meeting than their planned import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."

7. In refusing to give defendant's proposed instruction no. 10:

> "In ascertaining the meaning of a treaty, the words used are to be given their natural and ordinary signification. If the words express the meaning of the parties thereto plainly, distinctly, and perfectly, there ought to be no other means of interpretation, but if the words are obscure, ambiguous or imperfect, recourse must be had to other means of interpretation."

8. In refusing to give defendant's proposed instruction no. 11:

> "Treaties are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the object and purpose of the contract parties.
>
> "In this regard you are instructed in interpreting the Treaty with the Yakimas to take into consideration the history of the times and particularly the record of the treaty negotiations in any interpretation you must make as to what the parties intended."

9. In refusing to give defendant's proposed instruction no. 12:

> "In construing any Treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the Treaty were conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and form of creating the various technical estates known to their law, and assisted by an interpreter employed by them; that the Treaty is drawn up by them in their own lan-

guage; that the Indians, on the other hand, are a weak and dependent people, who have no written language and who are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the Treaty was framed is that imparted to them by the interpreters employed by the United States; and that the Treaty must, therefore, be construed, not according to the technical meaning of its words to learned lawyers but in the sense in which they would naturally be understood by the Indians and in the case of any ambiguities these ambiguities are to be resolved in favor of the Indians."

10. In refusing to give defendant's proposed instruction no. 14:

"In order to find the defendant guilty of the offense with which he is charged, it is necessary, (1) that Treaty Tribes and their members had a notice of hearing and a right to participate meaningfully in the adoption of the rule requiring Indians to be licensed when hunting outside of their ceded area or reservation. (2) That the State establish prior to regulation that the prohibition against hunting without a license is both reasonable and necessary to the conservation of the resources. (3) That this matter of the Indian Treaty right in regards to the licensing of Indians would be dealt with separately from the general legislation. (4) That this means a regulation with one least restrictive to the Indians. (5) That this regulation was for conservation purposes and not for revenue purposes."

11. In refusing to give defendant's proposed instruction no. 15:

"In determining what "Occupied" means you are instructed that the definition in Webster's Diction-

ary is as follows: To engage the attention or energies of; to fill up (an extent in space or time); to take or hold possession of: to reside in as an owner or tenant."

12. R.C.W. 77.32.010 and Game Department regulations passed pursuant thereto, as they relate to hunting license requirements for Yakima Indians, are void.

STATEMENT FROM RECORD

MR. HOVIS: First to get the Treaty matters into evidence and we will stipulate they are in evidence. It is so stipulated.

THE COURT: The record will so show.

(Defendant's exhibit for identification No. 4 and No. 5 admitted) (Stmt. 52)

At this time I will permit you to make an offer of proof.

MR. HOVIS: Offer of proof: In response to question I asked whether he had conversations with parents regarding the treaty of 1855, my client would say, yes. I think the objection is premature and not in proper place, but as it may I will inform the Court of where I'm heading.

THE COURT: I would like for you to do that.

MR. HOVIS: It is my intention and I do believe that this witness if allowed to continue testifying will testify, yes, he had conversations with his parents on these matters, that he has done considerable reading in regard to tribal history, that it has been a lifelong interest in history of the Yakimas.

Then I would ask him if at the time of the treaty if the history showed these people were food gathering, root gathering, hunting and fishing group of people. I believe his answer to that would be, yes.

I would then ask him if history showed these people were accustomed to going for buffalo. His answer would be yes. I would ask what route they took. He would basically set forth the route passing through this area.

I would ask if they hunted and fished on the way. He would say yes. He would further testify that the relationship of the Nez Perses, the Walla Wallas and the Umatilla, the Cayuse, these Indians in this area were almost brothers and sisters, with an intermarriage relationship, with sort of a family feeling one to the other, and that on the way to buffalo and otherwise there was great intercourse back and fourth between the tribes that made up the Yakima Nation and those made up of the Nez Perce Nation, and that basically they passed through the area because they didn't want to go north and get into the Blackfoot country or go south and get into the Bannock or Shoshone country.

He would testify not only his people hunted in this area but that the head chief of the Yakimas at the time of the treaty came as close as Starbuck, Washington, and his mother who was a Yakima came from a father who was a Nez Perce or Palouse, came from this particular area.

These people hunted throughout this area. He would further testify, this would be in line of historical, I have other testimony to elicit from him in regard to present day time.

MR. CONIFF: Does your Honor desire argument on this.

(Brief off-the-record remarks)

THE COURT: No, I feel the line of testimony as outlined in the offer of proof is not objectionable on the basis of being hearsay because I do feel that the Court can take judicial notice that the history of the Indian

prior to the time of their acquiring the white man's education was a matter of tradition passing from one generation to another, and a man could benefit himself as this gentleman could today, when he had that history and that tradition passed on to him in the manner in which it was passed from his forefathers. I would not rule this out on the basis of hearsay.

I am, however, sustaining the objection of the State and denying the defendant the right to pursue this line of questioning on the basis that I feel that after my reading of the treaty with the Yakima Nation that the question of usual and customary places he has the right to go, that the usual and customary places as stated in the treaty apply only to fishing rights and not to hunting rights, and any showing here of this country being the usual and customary place for hunting I feel would be irrelevant under my interpretation of the treaty, so I think I will stop the line of questioning concerning practices of the Yakima tribe in so far as hunting in this area.

MR. HOVIS: If I could take a moment with the exception. I want to make sure the Court is fully advised. I think this is a key point.

Might I inquire of the Court whether the Court feels whether the area is ceded or not ceded makes a difference

THE COURT: I do not. On that point in the discussion of the law we have discussed in chambers I am in disagreement with the position of the State that the hunting and fishing in a particular place as limited, if limited, by the treaty that limitation is not at the boundary of the land ceded by the Yakima Nation. I'm in disagreement with the position of the State on that.

MR. HOVIS: The reason I asked, that limits somewhat the exception. I'm excepting to this line —.

THE COURT: Excepting to my ruling ?

MR. HOVIS: Excepting to your ruling excluding this testimony on the ground this historical background, the way these people came and went through this particular area, is very important in determining the intent of the Indian people involved.

The Court is saying, as I understand the ruling, that the land on which the treaty Indians may hunt without a license must be open and unclaimed.

THE COURT: That is my position at this time.

MR. HOVIS: Therefore I believe this history, if the Court please, is so important as to determination of what people at the time of the treaty understood would be open and unclaimed. There are no legal definitions, no definitions in any cases or in the treaty itself what oepn and unclaimed land is. There is an apparent divergence of opinion on that, the State has one opinion, the defendant has another.

THE COURT: Apparently I have another.

MR. HOVIS: And the Court has one. I suppose if we had an opportunity to talk to the bailiff, or made inquiry of the jury maybe there would be several of those with an opinion. There is such a divergent idea of what is open, unclaimed land that we must look first to the treaty minutes. We must look to the history or the time to determine what these people were thinking about at the time that they made a determination in regard to open and unclaimed.

It is my feeling that from this testimony that would be elicited from this witness that the Court would find and the jury would find that at the very least that open and unclaimed was unoccupied.

I think the Court is correct, in regard to eliciting testimony from the witness in regard to history, as the

Court I know, read the James case. The same thing was done over objection in that case. Historical evidence always comes by word of mouth.

So if I may have an exception. I want to say to the Court I believe this testimony should be permitted. I want to be as complete in my exception as I can.

THE COURT: Realizing that I asked that you review in your mind and determine that you have fully in your offer of proof covered all points, because on appeal your offer of proof will go up. Do you feel you have it fully covered. I do not want to be unfair; I do not want to cut you off.

MR. HOVIS: This witness can not say from the history, I want to be perfectly clear to the Court and the Appellate Court as well, he isn't in a position to say the Indians at the treaty ground intended open and unclaimed ground meant any particular kind of ground.

This witness if he were allowed to testify would testify as to the history of this country, basically from the minutes of the treaty that the pressure was on to separate the Indian from the white man, more or less in all matters to separate the white man from the Indian. And that there was intention in all the conversations, both recorded and unrecorded, passed on to him, that the promises were made to the Indians that the Indians would be allowed to keep their culture, root picking, berry picking, hunting, fishing, many other things as well. There would be school teachers, and mechanics and carpenters, helping with agriculture.

There was clearly the thought all the way through the history that the Indian would be allowed to hunt within this area as long as it was on open and unclaimed land and any land which they felt the owner himself wasn't excluding them therefrom. In other words they felt like the history and intention and atti-

tude and interpretation had always been placed by the Yakima Nation on the fact they had a right, and in all history it has been their right, that the Indian could hunt any place where he was not excluded otherwise by signs or by the owner himself.

THE COURT: Here you have come up with something that I feel does have — the other material I still feel is irrelevant but if this witness can testify as to the customs and traditions as to what constituted open and unclaimed land then I think — Again I know the State is in disagreement on this point, then I think the matter of intent with this defendant is shown.

He has had the same indoctrination, I say this appreciating the State has said in conference on the legal points that intent is not at point.

To the extent this witness can testify to the traditions of what open and unclaimed land has been considered by the Indians. Now I'm going to instruct the jury as to what constitutes open and unclaimed land, I'm going to instruct on that, but for the purpose of going to the intent of this defendant I think the defendant is entitled to show if he can what his position was on what is open and unclaimed land.

Do you have any remarks?

MR. CONIFF: Perhaps for the record I should voice an exception?

THE COURT: Yes.

* * *

MR. HOVIS: One thing, I most certainly would agree perhaps somewhat with counsel is that the Court's determination of what open and unclaimed land is, but I don't think the Court is in position to say unless it takes the words open and unclaimed in the historical context with which they were spoken. I don't think the Court

can make that determination without historical background, and I think it is very necessary part of the case to make that determination.

THE COURT: You gentlemen do not make it easy.

(Brief off-the-record remarks)

I'll return to my original position on this thing and not permit this witness to testify as to what the historical consideration of what constituted open and unclaimed land was, because mulling this over in my mind it is not what his people thought, it is what this defendant thinks that his intention was. This witness's testimony does not indicate anything as to what the defendant's intentions were. So I'm going back again to my original position and disallow this testimony.

MR. HOVIS: I have fully explained my position.

THE COURT: Yes, now you have indicated there is another line of questioning in regard to this witness, is there likelihood there will be a subject of substance?

MR. HOVIS: I think so, I'm going to ask this witness if his duties as law and order, fish and wild life part of his duties, determine what his rights are, and ask what he said, what he informed members of the Yakima Tribe these are. And he is going to say he tells them they have the right to hunt within the easterly part of the State of Washington without a license.

I will ask if he has not communicated with the Department of Fish and Game on a regular basis and he would answer yes.

I would then ask if at any time since he has been chairman was he ever informed of the policy of the State of Washington in regard to whether said area, or whether open and unclaimed area, or whether he has read any material in this regard. He would answer —.

MR. CONIFF: I would object to that line of questioning. I think this is essentially going to the argument made in our briefs, and part of the argument yesterday on his motion to dismiss. Rather than reiterate that rather extensive argument I would simply state that counsel has come up with no case implying that the State does not have the right to enforce the law to all citizens on an equal basis, no case that indicates that failure on the part of public officials or State agency to arrest someone for the commission of what would be an offense or violation of a given law or regulation, failure to enforce this licensing law which I will contend is a matter of fact, matter of policy.

In 1942 the Department took the position Indians, treaty or non-treaty, could hunt or fish in the State of Washington. In 1958 as counsel indicated the case came down involving Chinook Indians. That case clearly drew the line, said only treaty Indians could have some right.

(Further legal argument presented by counsel)

THE COURT: The evidence is still excluded. Your exception is noted. Anything further?

(Brief off-the-record remarks)

MR. HOVIS: I think not.

(Witness excused)
(Brief off-the-record remarks)

MR. HOVIS: Defense rests, your Honor. (Stmt. 53-61).

* * *

MR. HOVIS: If the Court please at this time I would like to repeat the motion for dismissal with cause. Because of the lateness of the hour and our previous discussion I think the Court is fully conversant with my view in regard to this.

Comes now defendant and moves the Court for dismissal of this cause on the ground that there is no evidence or reasonable inference of evidence to justify a verdict or decision of guilty in this cause: That particularly I wish to call the Court's attention to the fact nothing has been shown that the regulation the State is imposing is reasonable or necessary to conservation of the resources which I believe is the requirement as pointed out previously, in the brief.

Just as the Court has taken away from the jury any determination as to their interpretation of the Treaty I think it is the duty of the Court to decide whether due process has been given this defendant. The evidence is complete; there is no definition of what is open and unclaimed land in any of the game manuals, there was nothing called to this defendant's attention, no record of law that the general statute prohibits hunting without a license. No exception made to that, nothing within that statute that gives the exceptions that are underneath the law.

I am most serious when I say due process has not been afforded in the law to put defendant on notice he may be in jeopardy if he hunts on the land in question. For that reason I would believe dismissal should lie.

We further believe that we have discussed, and I make grounds for the motion that this privilege of hunting isn't limited to open and unclaimed land.

MR. CONIFF: Does the Court desire a response on the motion?

THE COURT: I think not, I'm denying the motion. (Stmt. 63-64) The State may take their exceptions to instructions.

MR. HOVIS: Comes now defendant and excepts to the Court's giving instruction No. 4 "A", particularly in

regard to 4 "A", in as much as it limits the Treaty hunting rights of members of the tribe to open lands and to those lands not in private ownership, using private ownership as the only test. This test as determined by the Court is incorrect in counsel's opinion. The construction as we read it is that open and unclaimed land refers only to the privilege of pasturing horses, not the privilege of hunting.

Also this construction can be seen from reading the minutes which have been before the Court, and which the Court had opportunity to read showing what was explained to the Indians at the time in question.

In addition thereto, even if the Court were to say this phrase, as the Court apparently intends, — I'm shortening up my argument — We have had an opportunity to have two jury instruction conferences, only one of which was reported. We have had opportunity to explain to the Court what our reasoning is, but for the record I want to say nothing in any law or any case or any interpretation that makes determination that open and unclaimed lands means those lands in private ownership. The case is directly contradictory to the decision found in Circuit Court of Appeals, 382 Federal Second, 1013. And it is contrary to any interpretation that can be made of the Treaty.

We also except to the Court's failure to give defendant's proposed instructions No. 5, 6, 7, 8, 9, 10, which read as follows:

"INSTRUCTION NO. 5

"One of the elements of the crime charged is that the act done is alleged to have been wilful. The term "Wilfully" has elsewhere been defined in these instructions as meaning "intentionally". Therefore, I will instruct you on the definition of "intent".

" "Intent" expresses mental action as its most ad-

vanced point, or as it actually accompanies, an outward, physical act which has been determined on. "Intent" shows the presence of will in the act done. It is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, and with such knowledge, and with full liberty of action, willing and electing to do it.

" "Intent" then is a mental condition or state of mind. Being a mental condition or state of mind, intent or the lack of intent may be inferred by the jury from the proven facts and circumstances in the case, provided such proven facts or circumstances are sufficient to and do convince the jury, beyond a reasonable doubt, or the existence and character of such mental condition or state of mind."

"INSTRUCTION NO. 6

"The defendant has interposed a plea of Indian Treaty rights. You are instructed that the burden is upon the State to prove that the defendant was not within the perview of these Treaty rights. If, therefore you have a reasonable doubt as to whether or not the defendant was acting within his treaty rights then the State has failed to prove the crime charged and you must return a verdict of not guilty."

"INSTRUCTION NO. 7

"A treaty with an Indian Tribe has the same force and effect as a treaty with a foreign nation. It consequently is the supreme law of the land binding upon State courts, legislators and regulatory and enforcement agencies. The Yakima Treaty reserves to the defendant those unimpeded hunting rights which his ancestors had long enjoyed before the

Treaty, subject only to the qualifications contained within that document."

"INSTRUCTION NO. 8

"Words used in a treaty must be construed in the sense in which they would naturally be understood by the Indians."

"INSTRUCTION NO. 9

"The language used in Treaty with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meeting than their planned import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."

"INSTRUCTION NO. 10

"In ascertaining the meaning of a treaty, the words used are to be given their natural and ordinary signification. If the words express the meaning of the parties thereto plainly, distinctly, and perfectly, there ought to be no other means of interpretation, but if the words are obscurred, ambiguous or imperfect, recourse must be had to other means of interpretation."

I except to these proposed instructions of the Defendant not being given because each and every one of them has been taken from decisions which are cited in the trial brief presented to the Court.

The defendant also excepts for failure to give defendant's proposed instruction No. 11, which reads as follows:

"INSTRUCTION NO. 11

"Treaties are to be read in the light of the conditions and circumstances existing at the time they

were entered into, with a view to effecting the object and purpose of the contracting parties.

"In this regard you are instructed in interpreting the Treaty with the Yakimas to take into consideration the history of the times and particularly the record of the treaty negotiations in any interpretation you must make as to what the parties intended."

It is an instruction that would modify and give guidelines to the jury in interpretation of Instruction No. 4 "A" which has to do with whether there is an issue of ownership. It is a correct statement of the law and one that should be given.

Defendant excepts for the failure of the Court to give defendant's proposed instruction No. 12 and 13 reading as follows:

"INSTRUCTION NO. 12

"In construing any Treaty between the United States and an Indian Tribe, it must always be borne in mind that the negotiations for the Treaty were conducted, on the part of the United States, and enlightened a powerful nation, representatives skilled in diplomacy, masters of a written language, understanding the modes and form of creating the various technical estates known to their law, and assisted by an interpreter employed by them; that the Treaty is drawn up by them in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and who are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the Treaty was framed is that imparted to them by the interpreters employed by the United States; and that the Treaty must, therefore, be construed, not according to the technical meaning of its

words to be learned lawyers but in the sense in which they would naturally be understood by the Indians and in the case of any amiguities these ambiguities are to be resolved in favor of the Indians."

"INSTRUCTION NO. 13

"You are instructed that in determining whether or not the defendant acted in conformity with his treaty rights you are to judge him under the conditions then existing.

"If the defendant, acting as an ordinarily prudent man, honestly believed that he was on the kind of property where he had a right to hunt, and his conduct is to be judged by the conditions appearing to him at the time not by the conditions as they appear to you, the jury, in the light of the testimony before you. The defendant was entitled to act on appearances, and if he believed in good faith and on reasonable grounds that he was on this type of property, although it afterwards might develop that he was mistaken, if he acted as a reasonably and ordinary cautious and prudent man would have done under the circumstances as they appeared to him, he is not criminally liable."

I except to the failure of the Court to give these proposed instructions in as much as these are correct statements of the law. The State must come forth in their interpretation of treaty rights and prove these particular items before a verdict can stand.

We also except to the Court's failure to give defendant's proposed instruction No. 14, reading as follows:

"INSTRUCTION NO. 14

"In order to find the defendant guilty of the offense with which he is charged, it is necessary, (1) that

Treaty Tribes and their members had a notice of hearing and a right to participate meaningfully in the adoption of the rule requiring Indians to be licensed when hunting outside of their ceded area or reservation. (2) That the State establish prior to regulation that the prohibition against hunting without a license is both reasonable and necessary to the conservation of the resource. (3) That this matter of the Indian Treaty right in regards to the licensing of Indians would be dealt with separately from the general legislation. (4) That this means a regulation with one least restrictive to the Indians. (5) That this regulation was for conservation purposes and not for revenue purposes."

We except to the failure of the Court to give this instruction in as much as it is a correct statement of the law, a part of it the Court has already ruled on. The Court said you are not to consider whether it was within or without the ceded area as there has been mention of ceded area and it may confuse the jury.

Also the second part of the instruction has to do with determining whether the lands were open and unclaimed, that is whether they were actually occupied.

Along with that we except for the Failure of the Court to give Defendant's proposed instruction No. 15, reading as follows:

"INSTRUCTION NO. 15

"In determining what "Occupied" means you are instructed that the definition in Webster's Dictionary is as follows: To engage the attention or energies of; to fill up (an extent in space or time); to take or hold possession of; to reside in as an owner or tenant."

That is a definition of "Occupied" which should be before the jury.

Further the defendant sayeth not.

THE COURT: I am not going to give this to the jury tonight. It will have to go over until tomorrow.

(Brief off the record remarks)

MORNING SESSION

February 3, 1971, 9:30 a.m.

(The following proceedings occurred out of the presence of the jury.)

MR. HOVIS: If the Court please I have a preliminary matter before we have the jury back.

I didn't notice yesterday as the Court's Instruction No. 4 "A" was being prepared and didn't have an opportunity to read it over prior to taking my exceptions. In reviewing it last night I noticed that there is nothing that shows that defendant was engaged in hunting activity on private ownership. I also believe in the last sentence which reads:

> "If you find beyond a reasonable doubt that the defendant was engaged in a hunting activity on lands in private ownership with outward indications of such ownership observable to a reasonable man, as distinguished from governmental ownership, then you shall find the defendant guilty as charged."

I believe this is a directed verdict without the various aspects of the rest of the instruction. I believe it is an objectionable instruction.

THE COURT: Your exception will be noted.

MR. HOVIS: Also, your Honor, perhaps this is a good time to take this up. During discussion with counsel in the Court's chambers the Court indicated to counsel that the matters that were introduced as evidence will not go to the jury room, and the defendant excepts to that. They were introduced as exhibits. All exhibits

should go to the jury room. Defendant excepts for failure to send minutes to the jury room.

THE COURT: At the time exhibits 4 and 5 were admitted I believe I made no ruling. The Court admitted them solely for the purpose of making a record to assist the Court in interpreting the Stevens Treaty with the Yakima Indians. They are not a part of the treaty and therefore not a part of the law of the land of which the Court is required to take judicial notice, and therefore they were admitted, are admitted for that limited purpose only and will not go to the jury.

My feelings, if they did it would be rather confusing to the jury. Your exception to the Court's ruling is noted.

MR. HOVIS: Thank you, your Honor.

THE COURT: If that disposes of that you may bring in the jury. (Stmt. 68-77)

(Motion presented out of the presence of the jury)

Comes now the defendant Michael Rodger Chambers and moves for dismissal of the cause in this matter on the ground that the evidence is not sufficient to sustain a conviction, and also going even further, that the evidence before the court, stipulations of fact before this court, show conclusively that the defendant Chambers is not guilty of hunting big game, to wit, deer, without first having in his possession a valid Washington hunting license, because as a member of the Yakima Indian Nation he has the privilege and right of hunting deer within the state of Washington without having in his possession a valid Washington hunting license.

We so move, your Honor.

(Counsel presented argument in support of motion and Mr. Coniff, Assistant Attorney General presented argument resisting motion.)

(Jury called in and admonished and excused until 1:30 p.m., February 2, 1971)

THE COURT: The record will show the jury has been released for the evening. The ensuing discussion and argument are taken in the absence of the jury. You may proceed.

(Mr. Coniff presented further argument resisting motion to dismiss.)

THE COURT: How much time do you have on response?

MR. HOVIS: Very short, your Honor.

(Brief off the record remarks)

MR. HOVIS: First to get the Treaty matters into evidence and we will stipulate they are in evidence. It is so stipulated.

THE COURT: The record will so show.

(Defendant's exhibit for identification No. 4 and No. 5 admitted)

(Mr. Hovis presented further argument in support of his motion to dismiss.)

THE COURT: I'm denying the motion for dismissal of this action. I feel while I do not believe it is necessary under court rules where I'm denying the motion to state the reason I'm going to do that.

The principal and compelling reason for my denial of the motion is the feeling that I have that the plaintiff, the State of Washington, has made a prima facie showing that the defendant did kill a deer, that he killed it on privately owned land, that the land was enclosed, and that he had no license.

The combination of those three elements, I feel, make a sufficient showing for a violation of the law.

Now taking judicial notice, as I must, of the Treaty with the Yakima Nation I see no ambiguity, I see no uncertainty in the effect of Article 3. Even as a matter of semantics it appears to be a straightforward statement that the Indian people have the right and privilege of hunting, gathering roots and berries, pasturing horses and cattle, on all open and unclaimed land.

That as I say is not an unfamiliar statement, that is the treaty itself isn't unfamiliar. It is the Yakima treaty, yes, but I believe it is in substance the same as the Nez Perce treaty, most of the elements are about the same, and I think this clause is identical.

I practiced in this area for 32 years before going on the bench and a good part of the time, I was prosecuting attorney, and I had occasion to enter in cases involving Indians and game cases and so I am not entirely unfamiliar, thought definitely not as familiar as you two gentlemen appear to be. Mr. Jones, I am not decrying your ability in any way on this but I think that these gentlemen impress me as being specialists in this field.

I just can't read anything in this case except here's a man who was claiming a right that he did not have. It is going to have to go to the tryer of the facts, the jury.

We will now recess. (Stmt. 34-37)

(Brief off the record remarks)
(Court recessed for the evening)